

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 16, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2012AP1650

Cir. Ct. No. 2011CV3878

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL R. PELOZA,

DEFENDANT-APPELLANT,

ONE 2009 MITSUBISHI LANCER GTS,

DEFENDANT.

APPEAL from an order of the circuit court for Milwaukee County:
DOMINIC S. AMATO, Judge. *Reversed and cause remanded with directions.*

Before Curley, P.J., Fine and Brennan, JJ.

¶1 PER CURIAM. Michael R. Pelozza appeals from an order of the circuit court directing that his car be forfeited to the Milwaukee Metropolitan Drug

Enforcement Group. Pelozza contends that the forfeiture violates the Eighth Amendment. We agree and reverse the order. Upon remand, the circuit court shall vacate the forfeiture order, direct return of the car to Pelozza, and dismiss the State's forfeiture complaint.

¶2 Based on information from a confidential informant, the Drug Enforcement Group began investigating Pelozza for drug activity. Investigator Jonathan Rivamonte made contact with Pelozza and made arrangements to purchase approximately one ounce of marijuana for \$355. After that sale, Rivamonte asked Pelozza for a larger quantity. Pelozza agreed to sell him another six ounces of marijuana for about \$1500. The sale was not completed, as Pelozza was arrested and charged with felony possession with intent to deliver marijuana.

¶3 Pelozza entered a deferred prosecution agreement in which he pled guilty to misdemeanor possession. Pelozza successfully completed the agreement and, upon payment of a \$250 fine, Pelozza's conviction was ordered expunged. In the meantime, the State filed a summons and complaint for the forfeiture of Pelozza's car, a 2009 Mitsubishi Lancer GTS, because it had been used to transport drugs. After the criminal case was resolved, the forfeiture case proceeded.

¶4 Rivamonte testified, as did Pelozza's grandfather, Richard Lemke. Lemke told the court that he had loaned Pelozza \$15,000 to pay off his high-interest car loan. At the time of the hearing, Pelozza still owed his grandfather about \$8000. The circuit court adjourned the hearing to allow Lemke an opportunity to document this loan and its legitimacy.

¶5 Meanwhile, Pelozza retained a new attorney who, at the next hearing, raised additional issues on which the court allowed briefing. As relevant to this appeal, Pelozza's new attorney asserted that forfeiture of the vehicle, valued at

approximately \$16,000, was unconstitutional because it was excessive.¹ The circuit court rejected this argument, concluding that there was really no Eighth Amendment issue, and it ordered the vehicle forfeited to the Drug Enforcement Group. The forfeiture was subject to an \$8000 payment to Lemke for his security interest in the vehicle. Pelozo then filed this appeal.

¶6 The Eighth Amendment to the United States Constitution provides: “Excessive bail shall not be required, *nor excessive fines imposed*, nor cruel and unusual punishment inflicted.” (Emphasis added.) The excessive-fines clause applies to forfeitures. *See State v. Boyd*, 2000 WI App 208, ¶7, 238 Wis. 2d 693, 699, 618 N.W.2d 251, 254 (“If the goal of a civil forfeiture action is, at least in part, punishment, the forfeiture may not be constitutionally excessive.”). Neither party disputes that Pelozo’s car was properly considered as subject to potential forfeiture under WIS. STAT. § 961.55(1). The question of whether forfeiture of Pelozo’s car violates the Eighth Amendment is an issue we review *de novo*. *See Boyd*, 2000 WI App 208, ¶7, 238 Wis. 2d at 698–699, 618 N.W.2d at 254.

¶7 To determine whether a forfeiture is excessive, we are to consider the “proportionality test.” *See id.*, 2000 WI App 208, ¶11, 238 Wis. 2d at 702, 618 N.W.2d at 256 (citing *United States v. Bajakajian*, 524 U.S. 321, 333–334 (1998)). This test requires us to consider “the nature of the offense, the purpose for enacting the statute, the fine commonly imposed upon similarly situated offenders and the harm resulting from the defendant’s conduct.” *Boyd*, 2000 WI App 208, ¶14, 238 Wis. 2d at 702, 618 N.W.2d at 256.

¹ The State does not appear to dispute the car’s current valuation.

¶8 When we consider the factors in this case, it is patently obvious that forfeiture of Pelozo's car is excessive. Certainly, drug sales are not to be encouraged, but Pelozo was ultimately convicted of mere possession. Pelozo's offense did not involve violence, did not result in injury to anyone, and was not gang related. There is no suggestion that Pelozo is a large-scale drug dealer, and he had no prior criminal record. The total value of the drugs he sold was less than \$2000. The State apparently does not view the offense as exceptionally serious, as it was willing to permit a disposition resulting in expunction of the conviction and payment of a small \$250 fine. The maximum fine for misdemeanor possession was \$1000, and even for the originally charged felony, the maximum fine was only \$10,000. Forfeiture of a \$16,000 vehicle is unconstitutionally disproportionate to the offense at hand. Upon remand, the circuit court shall vacate the forfeiture order, direct return of the car to Pelozo, and dismiss the State's forfeiture complaint.

By the Court.—Order reversed and cause remanded with directions.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

